rate privileges by a group of individuals without legal sanction: in other words, the question is one of unauthorized corporate action.[7] And in dealing with the situation the analogy to the unauthorized action of domestic *de facto* corporations suggests itself. It is submitted that the analogy is close, and that the two questions should be similarly treated. In each case the state is interested in protecting its citizens in dealing with corporations. In each case considerations of fairness between the parties should be balanced against the policy of collateral attack to supplement direct attack by the state.[8] And in each case emphasis should be laid on whether or not an attempt has been made to comply with the law. Thus, by what is believed to be the better law, where such an attempt has been made, the foreign corporation is not refused relief for an invasion of its property rights.[9] Nor is the corporation to be regarded as a trespasser precluded from showing the contributory negligence of the plaintiff in a tort action.[10] Again validity is given to a conveyance of land by the foreign corporation,[11] and a party who has received the benefits of a contract with a foreign corporation is denied the right to collaterally attack its non-compliance with the statutory provisions.[12] But as a drastic check upon total disregard of the law by the foreign corporation, full liability is imposed on the associates, and the foreign incorporation is not recognized.[13] These decisions are strikingly similar to those accorded the unauthorized action of domestic *de facto* corporations,[14] and indicate a proper tendency to treat foreign and *de facto* corporations with equal tolerance.

THE STOCKHOLDER'S REMEDY FOR AN INJURY TO HIS CORPORATION OR TO HIMSELF. — A corporation owes a contractual duty to each shareholder to act within its authorized powers and manage the corporate property in a businesslike manner for the benefit of all concerned. That a stockholder, either by way of specific performance of this contractual liability or in protecting his property rights, may enforce these obligations and obtain redress for their violation is axiomatic. The difficulties involved here pertain not to the right itself but to the remedy. For the wrong to be redressed may result not only from the misconduct of the corporation, but from that of either its officers, the majority stockholders, or outsiders. And the conception of the corporation as a person distinct from the stockholders leads the law to regard a wrong to the corporation as one which the corporation alone can redress, even though a stockholder is, as he must be, damaged by the same wrong.[1] The latter's right is against the corporation, to force it to perform the obligation, which it owes to every stockholder, to redress the wrong.

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[7] In any particular jurisdiction, then, the immediate problem is to discover the general attitude of the state, whether hostile or tolerant towards unauthorized corporate action.

[8] A state may bring *quo warranto* to oust a foreign corporation. State *v.* Boston, etc., Ry. Co., 25 Vt. 433.

[9] Jordan *v.* Western Union Tel. Co., 69 Kan. 140.

[10] Bischoff *v.* Automobile Touring Co., 97 N. Y. App. Div. 17.

[11] Fritts *v.* Palmer, 132 U. S. 282.

[12] Washburn Mill Co. *v.* Bartlett, 3 N. D. 138. *Contra, In re* Comstock, Fed. Cas., No. 3078.

[13] Hill *v.* Beach, 12 N. J. Eq. 31.

[14] See 20 HARV. L. REV. 456; 21 *ibid.* 305.

[1] Smith *v.* Hurd, 12 Met. (Mass.) 371.

The remedy then is derivative, and this despite the obvious fact that there is actually a direct injury to the stockholder's interest. For this sort of injury, however, the law does not afford the stockholder a direct personal action against the guilty outsider.[2]

On the other hand, the interest of one stockholder alone may be so peculiarly affected by a breach of the corporation's obligations that his remedy will be personal and direct. Thus he may force the corporation to permit an inspection of the books and records,[3] to pay declared dividends,[4] and to allow subscription to a proportionate share of new issues of stock.[5] And the undertaking of an *ultra vires* act may be enjoined.[6] In these cases a shareholder's bill is obviously unwarranted; for the issue is primarily between the corporation and the particular stockholder, and the corporation cannot, of course, be plaintiff and defendant in the same proceeding.

This distinction between the direct remedy and the remedy derived from the right of the corporation itself is important because of the insistence with which the law has differentiated the two. Indeed a joinder of an individual claim together with a shareholder's bill renders the bill multifarious.[7] That the distinction is fundamental is seen in the incidents of the two forms of action. Obviously in the stockholder's personal action particular damage is a necessary allegation, whereas in a shareholder's bill an allegation of such damage is considered irrevelant.[8] Moreover, in a shareholder's bill it is necessary to show the refusal of the corporation to act,[9] unless a demand to this effect would be unavailing.[10] Again the act complained of must usually be beyond the powers of the officers and of the majority stockholders;[11] for it is not the purpose of the law to assail, at the instance of disgruntled stockholders, the reasonable discretion of those in control of the corporation. And since the bill is based on the right of the corporation all defenses against the corporation are pertinent,[12] as, for instance, that the corporation has been enjoined from proceedings,[13] or that a similar shareholder's bill has been adjudicated.[14] Similar suits by other stockholders, however, in no way affect the direct and personal action.

Theoretically clear the distinction here is often difficult of application, but as a practical test it is submitted that a situation necessarily presenting not only the rights of a stockholder and the corporation but also those of third parties calls for a shareholder's bill.[15] In this connection third parties

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[2] Converse *v.* United Shoe Machinery Co., 185 Mass. 422.

[3] Guthrie *v.* Harkness, 199 U. S. 148.

[4] Jermain *v.* Lake Shore & M. S. Ry. Co., 91 N. Y. 483.

[5] Stokes *v.* Continental Trust Co., 186 N. Y. 285.

[6] Tomkinson *v.* S. E. Ry. Co., 35 Ch. D. 675. *Cf.* note 15, *post.*

[7] Searles *v.* Gebbie, 115 N. Y. App. Div. 778. Though nominally the corporation is made defendant, it is simply the consolidation of two suits, and the suit is determined on the basis that the corporation is plaintiff.

[8] Kavanaugh *v.* Commonwealth Trust Co., 181 N. Y. 121. *Cf.* Tyree *v.* Bingham, 100 Mo. 451.

[9] Greaves *v.* Gouge, 69 N. Y. 154; Rathbone *v.* Gas Co., 31 W. Va. 798.

[10] Brewer *v.* Boston Theatre, 104 Mass. 378.

[11] Hawes *v.* Oakland, 104 U. S. 450; Foss *v.* Harbottle, 2 Hare 461. *Cf.* Groel *v.* United Electric Co, 70 N. J. Eq. 616; Dodge *v.* Woolsey, 18 How. (U. S.) 331.

[12] Kessler *v.* Ensley Co., 123 Fed. 546, 550; 148 Fed. 1019.

[13] See Smith *v.* Bulkley, 18 Colo. App. 227.

[14] Memphis, etc., R. R. Co. *v.* Greyson, 88 Ala. 572.

[15] Thus a stockholder may directly enjoin the undertaking of an *ultra vires* act, Tomkinson *v.* South Eastern Ry. Co., *supra;* but if he seeks to set aside an executed *ultra vires* transaction he must move through the corporation. Hulton *v.* Bancroft,

may consist of corporation officers or majority stockholders. Thus in a recent case one corporation, to prevent competition, secured control of another and so managed it as to render its stock worthless. A direct action by a stockholder of the latter corporation against the controlling corporation was held demurrable. *Ames* v. *American Telephone & Telegraph Co.*, 166 Fed. 820 (Circ. Ct., D. Mass.).

INJUNCTIONS AGAINST PRIVATE NUISANCES. — Against a continuing nuisance by a private individual or corporation equity will grant an injunction in favor of an innocent plaintiff who would otherwise suffer irreparable injury. As additional reasons for equity jurisdiction, desire to prevent multiplicity of suits and recognition of the inadequacy of the plaintiff's remedy at law are commonly mentioned.[1] Neither, however, is important; for equity will enjoin the commission of a single tort as readily as a nuisance where irreparable injury is threatened; [2] and as for the inadequacy of the remedy at law, that is obviously an element of the nature of the threatened injury. Irreparable injury in this connection may be defined as injury which is not only continuous but cumulative in effect, assuring in due time either such damage to the plaintiff as to personally disable him from the beneficial use of his property, or the destruction of that beneficial use itself.[3] On the other hand, injury not irreparable, occasioned by a private nuisance, is not cumulative: its effect is to cause and maintain a definite deterioration in the beneficial use of the plaintiff's property, which may be felt either continuously or periodically in the same degree. Where injury of the latter class is threatened, it is said that equity will assume jurisdiction on the joint ground that the plaintiff's remedy at law is inadequate, and that he will otherwise be driven to a multiplicity of suits at law.[4] But the very need of this multiplicity for redress at law amounts in itself to inadequacy. Equity jurisdiction should not depend on whether or not damages as computed by a jury can accurately enough measure the plaintiff's injury: in each such action he will obtain the only kind of redress possible either at law or in equity for a *past* wrong of this nature. The true ground is not that the law is inadequate [5] within its sphere, but that, since the law can deal with the situation only as it breaks off into a sequence of separate torts, it is better that equity should grant single relief by dealing with it while there is still, so to speak, a single issue.

Where the plaintiff is entirely innocent,[6] may equity ever justifiably refuse to take jurisdiction in this class of cases as in trespass? For as equity takes

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& Sons Co., 83 Fed. 17. It must be recognized that cases may arise involving both rights; so that either form of action is appropriate. Ritchie *v.* McMullen, 79 Fed. 522.

[1] American Smelting & Refining Co. *v.* Godfrey, 158 Fed. 225.

[2] Echelkamp *v.* Schrader, 45 Mo. 505.

[3] Sullivan *v.* Jones & Laughlin Steel Co., 208 Pa. 540.

[4] 2 Story, Eq. Jur., 13 ed., § 925.

[5] A distinction should be taken between difficulty of computing damages due to the nature of the injury and the character of the tribunal, and the impossibility of recovering the damages assessed because of the defendant's insolvency, which is in itself often considered a ground for equitable jurisdiction. Reyburn *v.* Sawyer, 135 N. C. 328, 340.

[6] If the plaintiff, actively or by acquiescence, encouraged the defendant to make expenditures, equity will not hesitate to decline jurisdiction. See Stock *v.* City of Hillsdale, 119 N. W. 435 (acquiescence).